84-1327 (1)

Office-Supreme Court, U.S.
FILED
JAN 31 1985
ALEXANDER L. STEVAS
CLERK

NO. _____

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1984

CARLOS S. SOTO and ROBERT
DEMALLORY, on behalf of
themselves and all others
similarly situated, Petitioners

v.

WALTER J. DICKEY, WARREN
YOUNG and THOMAS BORGEN.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the defendants-respondents' use of mace and/or other chemical agents on the plaintiffs-petitioners, while the plaintiffs-petitioners were locked in their prison cells and, in some circumstances, additionally handcuffed or otherwise restrained, and where the plaintiffs-petitioners did not create an immediate threat of bodily injury or death, violated their rights under the Eighth and/or Fourteenth Amendments to the United States Constitution.

II. Whether the Court of Appeals mistakenly assumed that the standards establishing a violation of the Eighth Amendment are the same as the standards establishing a violation of the Fourteenth Amendment and consequently ignored the conclusion of the District Court that the actions of the defendants-respondents violated state regulations and plaintiffs-petitioners' rights under the Fourteenth Amendment.

III. Whether the Court of Appeals exceeded its authority by improperly substituting its opinion of the evidence for that of the Trial Court.

LIST OF ALL PARTIES

Plaintiffs-petitioners: Carlos S. Soto, Robert DeMallory, and all past, present and future residents of the Adjustment Center at the Waupun Correctional Institution, State of Wisconsin.[1/]

[1/] This petition is brought by Carlos S. Soto and Robert DeMallory, on behalf of themselves and all past, present and future residents of the Adjustment Center at the Waupun Correctional Institution, State of Wisconsin. The action was certified as a class action by the District Court, pursuant to Fed. R. Civ. P. 23(a) and (b)(2), on February 21, 1981.

Defendants-respondents: Walter J. Dickey, Warren Young and Thomas Borgen.[2/]

[2/] The Administrator of the Division of Corrections, the Superintendent of the Waupun Correctional Institution, and the Assistant Superintendent of Security at the Waupun Correctional Institution are the defendants-respondents in this action. At the time of the filing of the Complaint and through the trial of this action, Elmer O. Cady was the Administrator of the Division of Corrections, Thomas R. Israel was the Superintendent of the Waupun Correctional Institution, and Gerald Heeringa was the Assistant Superintendent of Security at the Waupun Correctional Institution. Mr. Cady has been replaced by Walter J. Dickey. Mr. Israel was replaced by Donald Clusen, and Mr. Clusen subsequently has been replaced by Warren Young. In addition, Mr. Heeringa has been replaced by Thomas Borgen. Therefore, Mr. Dickey, Mr. Young and Mr. Borgen are substituted as defendants-respondents pursuant to Fed. R. App. P. 43(c).

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PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Carlos S. Soto and Robert DeMallory, on behalf of themselves and all others similarly situated, the petitioners herein, pray that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Seventh Circuit entered in the above-entitled case on September 20, 1984.

OPINIONS BELOW

The September 20, 1984 opinion of the Court of Appeals, whose judgment is herein sought to be reviewed, is reported at Soto v. Dickey, 744 F.2d 1260 (7th Cir. 1984), and is reprinted in the separate Appendix to this Petition, at pages 3-56 ("App. pp. 3-56").[3/] The November 2, 1984 order of the Court of Appeals denying

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3/On November 2, 1984, the Seventh Circuit Court of Appeals entered an order denying the plaintiffs-petitioners' Petition For Rehearing In Banc, and amending the opinion that it had entered on September 20, 1984. (As noted above, a copy of that order is reprinted at App. pp. 151-152.) Therefore, the opinion reported at Soto v. Dickey, 744 F.2d 1260 (7th Cir. 1984) contains amendments to the original opinion entered by the Court on September 20, 1984. The opinion of the Seventh Circuit Court of Appeals, as it was entered on September 20, 1984, is reprinted at App. pp. 3-56.

the plaintiffs-petitioners' Petition For Rehearing With Suggestion For Rehearing In Banc, was not reported and is reprinted herein at App. pp. 151-152. The June 29, 1983 opinion of the United States District Court for the Eastern District of Wisconsin is reported at Soto v. Cady, 566 F.Supp. 773 (E.D. Wis. 1983) (findings of fact, conclusions of law), and is reprinted herein at App. pp. 57-116. The District Court's February 22, 1982 decision denying the plaintiffs-petitioners' motion for preliminary injunction and summary judgment was not reported, and is reprinted herein at App. pp. 119-148.

JURISDICTION

The judgment of the Court of Appeals was entered on September 20,

1984. The plaintiffs-petitioners' Petition For Rehearing With Suggestion For Rehearing In Banc was denied by the Court of Appeals on November 2, 1984. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Eighth Amendment to the Constitution of the United States, which provides as follows:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

This case also involves the first section of the Fourteenth Amendment to the United States Constitution, which provides as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

In addition, this case involves the following regulations of the Division of Corrections, Department of Health and Social Services, State of Wisconsin, the pertinent portions of which are set forth in the attached Appendix: 4 Wis. Admin. Code HSS 306.01 (App. p. 153); 4 Wis. Admin. Code HSS 306.03 (App. p. 153); 4 Wis. Admin. Code HSS 306.06 (App. pp. 154-157); 4 Wis. Admin. Code HSS

306.06(1)(a) (App. p. 154); 4 Wis. Admin. Code HSS 306.06(2) (App. p. 155); 4 Wis. Admin. Code HSS 306.08 (App. pp. 157-159).

STATEMENT OF THE CASE

This is a civil rights action brought by the named plaintiffs, Carlos S. Soto and Robert DeMallory, on behalf of themselves and all past, present, and future residents of the Adjustment Center at the Waupun Correctional Institution, State of Wisconsin. The plaintiffs-petitioners, seeking injunctive and declaratory relief, maintain that the defendants-respondents violated their constitutional rights under the Eighth and Fourteenth Amendments to the United States Constitution and under state law through the improper use of

mace and other chemical agents in the Adjustment Center.

The plaintiffs-petitioners, proceeding pro se, filed their Complaint on February 20, 1980, pursuant to 42 U.S.C. §1983, 28 U.S.C. §1331 and 28 U.S.C. §1343(3). Their motion to proceed in forma pauperis was granted by the District Court on February 21, 1980. On June 11, 1980, the class plaintiffs filed a motion seeking assistance of counsel. The District Court granted the plaintiffs' motion and requested the undersigned to act as counsel on July 7, 1980.

The Adjustment Center and Chemical Agents

The Waupun Correctional Institution is a maximum security prison in the State of Wisconsin, with an approved designated capacity of 810

inmates. At the time of the trial, the Institution had a population of approximately 1,154 inmates. (See The District Court's fifth Finding of Fact, Soto v. Cady, 566 F.Supp. 773, 780 (E.D. Wis. 1983), reprinted at App. p. 89.) ("Finding 5; 566 F.Supp. at 780; App. p. 89.") The Adjustment Center, the major segregation center within the institution, is a concrete and steel building containing 67 cells. Three of the sides of each cell are solid concrete. The fourth side consists of a metal barred door. Fifteen of the cells have a wooden outer door in addition to the metal barred doors and are commonly referred to as double door or wooden door cells. Inmates are sent to the Adjustment Center from the general population for disciplinary purposes and punishment resulting from

violations of prison rules. The reasons an inmate may be sent to the Adjustment Center range from possession of contraband, theft, refusing to go to work, up to fighting with prisoners or staff. (Findings 6, 7, 9; 566 F.Supp. at 780; App. pp. 90-91.)

Two chemical agents, Chloroacetenophenone (CN) and Chlorobenzylmalononitrite (CS), are used in the Adjustment Center. CN and CS are intended to have the immediate effect of disabling and incapacitating persons on whom they are discharged by causing pain and an intense and pervasive burning and tearing action. (Findings 12, 17; 566 F.Supp. at 781; App. pp. 92, 94.) The application and use of CN and CS may result in serious and permanent physical injury, especially to the eyes and skin, in

the absence of immediate and competent medical attention. The possibility of serious injury as a result of the use of chemical agents is greater when chemical agents are used in enclosed, poorly-ventilated areas such as a prison cell. (Findings 18, 27; 566 F.Supp. at 781, App. pp. 94, 96.) Mace is a brand name used by one of the manufacturers of the CN which is available in the Adjustment Center.

Guidelines Regarding the Use of Mace in the Adjustment Center

The State of Wisconsin has established guidelines regarding the use of chemical agents in the Adjustment Center. The first document issued by the Department of Health and Social Services, Division of Corrections on the use of chemical agents was placed into effect on January 15, 1978 and stated that:

> Chemical agents for purposes of security and control shall be used only in extraordinary circumstances when a situation arises in which physical force would be otherwise necessary and unavoidable to protect residents or staff from great bodily harm. (Emphasis added.)

(Finding 28; 566 F.Supp. at 781; App. pp. 96-97.)

The Wisconsin Administrative Code provides even more specific guidelines regarding the use of chemical agents by Wisconsin prison officials. 4 Wis. Admin. Code HSS 306.06 ("HSS 306.06") strictly limits the use of "force" against inmates, and HSS 306.06(1)(a) specifically includes the use of chemical agents within its definition of force. App. pp. 154-157. However, in addition to the restrictions contained in HSS 306.06, HSS 306.08 provides additional limitations

regarding the use of chemical agents. As of the date of the trial in this action, HSS 306.08 provided that chemical agents could be used in two and only two situations: (1) to subdue an inmate who posed an immediate threat of injury or death to another, and (2) to regain control of an institution or part of an institution. App. pp. 157-159. The regulations also provided that the use of chemical agents "shall be authorized only by the Superintendent". App. pp. 158-159.[4/]

On occasions when chemical agents are used in the Adjustment Center,

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[4/]On June 8, 1984, the Wisconsin Department of Corrections proposed an Amendment to HSS 306.08 which would provide more detailed restrictions regarding the use of chemical agents against inmates. HSS 306.08, as amended effective November 1, 1984, is reprinted at App. pp. 160-167.

"Macing Incident Reports" are written by correctional officers and are intended to contain most of the relevant information regarding the use of chemical agents on a particular occasion. (Finding 23; 566 F.Supp. at 781; App. p. 95.)

The Use of Chemical Agents in the Adjustment Center

The Macing Incident Reports indicate that approximately 130 "macing incidents" occurred in the Adjustment Center from January 1, 1981 to November 4, 1982. Nearly all of these macing incidents involved situations where inmates were maced or suffered the effects of mace while they were locked in their cells or in a strip cage. (Findings 21, 22; 566 F.Supp. at 781; App. p. 95.) Moreover, the reports demonstrate that

many of the incidents involved the use of mace on inmates who were handcuffed or otherwise restrained in addition to being locked in their cells. Specifically, the incident reports indicate that chemical agents have been used in the Adjustment Center in the following situations: (1) to create and preserve an atmosphere of discipline (Finding 38; 566 F.Supp. at 782; App. p. 100); (2) to gain compliance with non-emergency orders when the inmates against whom the agents are used are locked in their cells, handcuffed, or otherwise restrained (Finding 39; 566 F.Supp. at 782; App. p. 100); (3) to seek compliance with an order to stop yelling obscenities (Finding 40; 566 F.Supp. at 782; App. p. 100); (4) against inmates who refuse orders to take medication (Finding 41; 566

F.Supp. at 782; App. p. 100) (the incident reports relevant to this finding were presented at trial as Exhibits 115, 116, 121, 123, 125, 126) [Ex. 115, 116, 121, 123, 125, 126]); (5) against an inmate who threw liquid from a cell, where the inmate was otherwise passive, non-violent, without any weapons, and not issuing any threats of any kind (Findings 42, 47, 48; 566 F.Supp. at 782, App. pp. 100, 102, 103) (Ex. 57); (6) against an inmate who, while otherwise passive and locked in his cell, refused to remove a book from the outer wooden door of an adjustment cell (Findings 43, 51; 566 F.Supp. at 782, 783; App. pp. 101, 103, 104) (Ex. 55A); (7) against an inmate who, while otherwise passive and locked in his cell, refused to return his plastic

meal tray (Findings 44, 45; 566 F.Supp. at 782; App. pp. 101, 102) (Ex. 63, 125); and (8) against an inmate who was locked, naked, in a small strip cage, because the inmate had refused to spread his buttocks for a search. (Finding 52; 566 F.Supp. at 783; App. p. 104) (Ex. 124).

The experiences of two of the plaintiffs-petitioners illustrate the circumstances in which chemical agents have been used in the Adjustment Center. Inmate Robert Mallory was directly maced, in the eyes, on February 4, 1981, while he was passive and locked in his cell, for refusing to return his plastic meal tray. Instead of returning the tray, he placed it on his bed, went to the back of the cell and sat on the toilet or sink. He was not violent, made no

threats against any of the guards, had no weapons and was not barricaded in his cell. On February 5, 1981, Mallory followed the same pattern of conduct as on February 4, 1981. However, instead of macing Mallory on that date, several guards entered his cell dressed in Emergency Response Unit equipment and retrieved the tray from the cell. (Findings 44, 45; 566 F.Supp. at 782; App. pp. 101, 102) (Ex. 63).

Inmate Laron McKinley was maced on November 24, 1980, while he was passive and locked in one of the double-doored adjustment cells. On that date McKinley was maced for refusing to remove a book from the outer wooden door of the cell. The inner metal barred door was locked at all times. Inmate McKinley did not issue any threats against any

correctional officers, did not posses any weapons in his cell, and was not barricaded in his cell. (Finding 51; 566 F.Supp. at 783; App. pp. 103-104) (Ex. 55A, App. pp. 138-139).

The Rulings Below

Trial to the District Court was held on November 16-19, 1982. In order to insure the manageability of the trial, the District Court suggested and counsel agreed to limit the number of fact witnesses testifying about the 130 macing incidents. The first day of trial took place at the Waupun Correctional Institution. Testimony of five individual plaintiffs was taken inside the prison and the Court viewed the Adjustment Center. The remainder of the trial took place at the federal courthouse in Milwaukee, Wisconsin.

On June 29, 1983, the District Court issued its decision, order and judgment. The District Court ruled that the defendants-respondents, and their subordinates and agents, had violated the plaintiffs-petitioners' rights under the Fourteenth Amendment to the Constitution by using chemical agents in violation of the Wisconsin Administrative regulations. Soto v. Cady, 566 F.Supp. 773, 784 (E.D. Wis. 1983) (App. p. 108). In addition, the District Court held that the defendants-respondents had violated the plaintiffs-petitioners' rights under the Eighth Amendment to the Constitution. Soto v. Cady, 566 F.Supp. 773, 784-785 (E.D. Wis. 1983) (App. p. 107). The District Court entered a permanent injunction restricting the circumstances under

which chemical agents could be used in the Adjustment Center.[5/]

The decision of the District Court was reversed by a panel of the Seventh Circuit Court of Appeals in an order entered on September 20, 1984. Soto v. Dickey, 744 F.2d 1260 (7th Cir. 1984) (App. pp. 3-56).

5/In a related damage action brought by Carlos S. Soto, one of the named plaintiffs in the class action, the District Court found that the defendants had violated plaintiff Soto's rights, but held that a "good faith immunity" defense was available to the defendants and declined to award damages to Soto. (App. p. 87). The undersigned did not act as counsel in the damage action, and the damage action is not specifically included within this Petition.

REASONS FOR GRANTING THE WRIT

I. The Court of Appeals Mistakenly Assumed That The Standards Establishing A Violation Of The Eighth Amendment Are The Same As The Standards Establishing A Violation Of The Fourteenth Amendment And Consequently Ignored The Conclusion Of The District Court That The Actions Of The Defendants-Respondents Violated The Plaintiffs-Petitioners' Rights Under The Fourteenth Amendment.

The only portion of the opinion of the Court of Appeals which discusses the District Court conclusion that the defendants-respondents violated the plaintiffs-petitioners' rights under the Fourteenth Amendment is the last sentence in the last paragraph before the panel reaches its decision to reverse and remand this case. Soto v. Dickey, 744 F.2d at 1271; App. p. 55. The determination of whether or not the use of mace against prisoners locked in their cells, where there is no immediate threat of bodily injury

or death, violates the Eighth Amendment does not resolve the question whether or not the same actions violate the Fourteenth Amendment.

Prisoners retain certain rights under the Fourteenth Amendment and "may not be deprived of life, liberty or property without due process of law." Hewitt v. Helms, 459 U.S. 460, 103 S.Ct. 864, 869, 74 L.Ed.2d 675, 685 (1983), on remand, 712 F.2d 48 (3d Cir. 1983); Wolff v. McDonnell, 418 U.S. 539, 556, 94 S.Ct. 2963, 2974, 41 L.Ed.2d 935, 951 (1974). A due process right in the prison context may arise from the Constitution or some entitlement of the state such as statute, custom, policies, practices, rules or regulations. Hewitt v. Helms, 459 U.S. 460, 103 S.Ct. 864, 869, 74 L.Ed.2d 675 685 (1983);

Meachum v. Fano, 427 U.S. 215, 96 S.Ct. 2532, 49 L.Ed.2d 451 (1976), reh. denied, 429 U.S. 873, 97 S.Ct. 191, 50 L.Ed.2d 155 (1976). This concept was articulated by the Seventh Circuit Court of Appeals in Stringer v. Rowe, 616 F.2d 993 (7th Cir. 1980):

> In Meachum v. Fano, supra, 427 U.S. at 229, 96 S.Ct. at 2540, the Supreme Court held that the state could create a liberty interest "by statute, by rule or regulation." This court has recognized that a prisoner may have due process rights as a result of entitlements created by prison regulations and by official policies or practices. Arsberry v. Sielaff, supra, 586 F.2d at 47; Durso v. Rowe, 579 F.2d 1365, 1369 (7th Cir. 1978), cert. denied, 439 U.S. 1121, 99 S.Ct. 1033, 59 L.Ed.2d 82 (1979). 616 F.2d at 996.

A liberty interest is a substantive interest of an individual. Shango v.

Jurich, 681 F.2d 1091, 1100-1101 (7th Cir. 1982).

Liberty interests may originate in the due process clause itself. Johnson By Johnson v. Brelje, 701 F.2d 1201, 1205 (7th Cir. 1983). The liberty interest contained in the due process clause protects persons from summary punishment and unprovoked attacks. Freeman v. Franzen, 695 F.2d 485, 491 (7th Cir. 1982), cert. denied, Branche v. Freeman, ___ U.S. ___, 103 S.Ct. 3553, 77 L.Ed.2d 1400 (1983); Johnson v. Glick, 481 F.2d 1028 (2d Cir. 1973), cert. denied, Employee-Officer John v. Johnson, 414 U.S. 1033, 94 S.Ct. 462, 38 L.Ed.2d 324 (1973); Battle v. Anderson, 376 F.Supp. 402, 433-434 (Battle I) (E.D. Okl. 1974), 447 F.Supp. 516 (Battle II) (E.D. Okl. 1977), aff'd, 564 F.2d 388 (10th Cir.

1977), evidentiary hearing, 457 F.Supp. 719 (E.D. Okl. 1978), remanded on other grounds, 594 F.2d 786 (10th Cir. 1979); Vargas v. Correa, 416 F.Supp. 266, 269 (S.D.N.Y. 1976); Matthews v. Hughes, #CV-78-PT-5098-NE (N.D. Ala. 1980).

The manner in which a liberty interest is created by the state was defined by this Court in Olim v. Wakinekona, 461 U.S. 238, 103 S.Ct. 1741, 75 L.Ed.2d 813 (1983). There the Court stated:

> These cases demonstrate that a State creates a protected liberty interest by placing substantive limitations on official discretion. An inmate must show "that particularized standards or criteria guide the State's decisionmakers." Connecticut Board of Pardons v. Dumschat, 452 U.S. 458, 467, 101 S.Ct. 2460, 2465, 69 L.Ed.2d 158 (1981) (BRENNAN, J., concurring). If the decisionmaker is not

> "required to base its decisions on objective and defined criteria," but instead "can deny the requested relief for any constitutionally permissible reason or for no reason at all," ibid., the State has not created a constitutionally protected liberty interest. See id., at 466-467, 101 S.Ct., at 2465 (opinion of the Court); see also Vitek v. Jones, 445 U.S. at 488-491, 100 S.Ct., at 1261-62 (summarizing cases). 103 S.Ct. at 1747, 75 L.Ed.2d at 823.

Accord, Shango v. Jurich, supra. The existence of a liberty interest is determined by the nature of the interest rather than its source. See Shango v. Jurich, 681 F.2d at 1099.

The District Court was correct in concluding that the defendants violated the Fourteenth Amendment by using chemical agents in violation of the Wisconsin Administrative Regulations, HSS 306.08. (Soto v.

Cady, 566 F.Supp. at 784; App. p. 77.) It found that the State of Wisconsin had placed substantial limitations on the discretion of prison officials in the use of chemical agents and that the plaintiffs had a liberty interest in not being subjected to the use of chemical agents except as set forth in the regulations. (Soto v. Cady, 566 F.Supp. at 784; App. p. 77.) The limitations placed on the discretion of prison officials in the use of chemical agents are obvious. The administrative regulations of the Division of Corrections forbid the use of excessive force, 4 Wis. Adm. Code HSS 306.06(1)(a), and the corporal punishment of inmates, 4 Wis. Adm. Code HSS 306.06(2). (App. pp. 154-155.) HSS 306.08 permitted the use of chemical agents in only two

circumstances: (1) to subdue an inmate or inmates who posed an immediate threat of bodily injury or death to another or (2) to regain control of an institution or part of an institution. (App. p. 158.) The defendants and their subordinates were simply and completely prohibited from using mace under any other circumstances. These prohibitions created a reasonable expectation that chemical agents would not be used against the plaintiffs in the absence of these circumstances. See e.g., Arsberry v. Sielaff, 586 F.2d 37, 45-46 (7th Cir. 1978).

The District Court found that the defendants used chemical agents against the plaintiffs in violation of the regulations. (Soto v. Cady, 566 F.Supp. at 778-780, 784; App. p. 76-84.) This finding was clearly

supported by testimony of the plaintiffs and the incident reports, which demonstrate that mace and other chemical agents have repeatedly been used against the plaintiffs-petitioners in situations where there was no imminent or actual threat of violence or bodily injury or where control over a portion of the institution was lost.

Accordingly, The decision of the District Court concluding that defendants violated plaintiffs' rights under the Fourteenth Amendment should have been affirmed.

II. The Court of Appeals Substituted Its Opinion Of The Evidence For That Of The District Court In Direct Contravention Of Proper Appellate Practice, Fed. R. Civ. P. 52(a), And Pullman-Standard v. Swint, 456 U.S. 273, 102 S.Ct. 1781, 72 L.Ed. 66 (1982).

The primary thrusts of the opinion of the Court of Appeals are its views

that the District Court failed to give proper deference to the correctional officials (Soto v. Dickey, 744 F.2d at 1267-69; App. pp. 33-48) and that the findings of fact of the District Court were clearly erroneous, especially concerning the defendants' motives for the macings. (Soto v. Dickey, 744 F.2d at 1264-65; App. pp. 18-27.) In reaching its decision the panel failed to properly apply the standards of review which govern its conduct and instead attempted to impose its views as though it was hearing this case de novo.

It is well settled that injunctive relief granted by a district court will not be disturbed absent a showing that the district court abused its discretion. Doran v. Salem Inn, Inc., 422 U.S. 922, 931-32, 95 S.Ct. 2561, 2567-68, 45 L.Ed.2d 648 (1975);

Federal Savings and Loan Ins. Corp. v. PSL Realty Co., 630 F.2d 515, 520 (7th Cir. 1980), cert. denied Granite Invest. Co. v. Federal Savings and Loan Ins. Corp., 452 U.S. 961, 101 S.Ct. 3109, 69 L.Ed.2d 971 (1981); Beneficial Finance Of Wisconsin v. Wirtz, 346 F.2d 340, 344 (7th Cir. 1965). Furthermore, the detailed findings of facts issued by a district court should not be set aside unless they are found to be clearly erroneous. Pullman-Standard v. Swint, 456 U.S. 273, 102 S.Ct. 1781, 72 L.Ed.2d 66 (1982); Fed. R. Civ. P. 52(a). As recognized by the Seventh Circuit Court of Appeals in Clark v. Ziedonis, 513 F.2d 79, 83 (7th Cir. 1975), the district court, as the trier of fact, is often "called upon to make difficult factual determinations" which must be accorded

"great deference" because the trial judge is in a position to observe all of the facts and circumstances surrounding the case, including the demeanor of the witnesses.

The District Court's decision, findings of fact, conclusions of law, injunctive order and judgments were issued after it heard trial testimony by individual prisoners, guards, prison officials and correctional and medical experts over a four day period, viewed the adjustment center, reviewed the Macing Incident Reports and other trial exhibits, studied the applicable administrative regulations, and examined the relevant legal issues and constitutional standards. The decision and injunctive order are replete with specific findings of fact and conclusions of law and contain a thorough discussion of the applicable legal principles.

The District Court was keenly aware of the need for deference to correctional officials in the administration of a prison system. However, the defendants' own absolute refusal to alter their policies and practices forced the District Court to enter the injunction to protect the plaintiffs-respondents' constitutional rights. The District Court's sensitivity to the requirements of federal-state comity is displayed in both its February 22, 1982 decision denying the plaintiffs' motion for summary judgment and preliminary injunction and in its decision and order dated June 29, 1983 granting permanent injunctive relief. In the summary judgment decision, the District Court stated:

. . . Federal courts have followed a strong, well-established policy of avoiding unnecessary interference with internal prison administration. For that reason and because the state administrative regulations exhibit a sensitivity to constitutional requirements, I will not preliminarily enjoin defendants, but will admonish them to look more closely at their regulations and the case law discussed below . . . . (App. pp. 128-129.)

. . . A prison cannot be run by stubborn, defiant inmates, but rather it must be run by state officials lawfully entrusted with the responsibility for administering a reasonably safe and orderly institution. Because of the serious and difficult tasks faced by defendants to this action, I am convinced that the public interest is served by allowing them time to reevaluate their interpretation of the regulations before being faced with a federal court order.

App. p. 146. In the decision and order granting permanent injunctive relief to the plaintiffs, the District Court stated:

> So far as I can tell, the decision of February 22, 1982, has had no effect on defendants' views. Consequently, I must set aside my reluctance to become involved in the administration of the prison and my hope that the defendants would recognize that regardless of their personal views, the law, while not entirely clear, requires curbs on the use of chemical agents. The point has come to be certain that the constitutional rights of the inmates are not being violated.

Soto v. Cady, 566 F.Supp. at 776; App. p. 66. It is clear that the District Court gave the defendants-respondents the deference they deserved.

Every finding of fact issued by the District Court was supported by the evidence after a review and evaluation of all the evidence. In many instances, the District Court's findings were supported by the testimony of the defendants and their subordinates. In fact, the most persuasive proof that the defendants-respondents violated constitutional and regulatory requirements is found in the Macing Incident Reports prepared by one or more of the correctional officers involved in the macing incidents. As noted above, these reports are intended to contain all relevant information regarding the use of chemical agents. In Bracey v. Herringa, 466 F.2d 702, 704-705 (7th Cir. 1972), which involved defendant Heeringa while he was a captain, the

Seventh Circuit Court of Appeals expressly recognized the suspect nature of such reports. Yet, despite the biased and self-serving nature of these reports, particularly those which were written after the inception of this lawsuit, they clearly support the plaintiffs-petitioners' claims. (See Ex. 1-128A.)

Despite the District Court's acknowledgement of the defendants' testimony and its citations to and reliance upon the Macing Incident Reports, the Court of Appeals accused the District Court of ignoring the testimony of the defendants. Such an accusation is obviously unfounded in the instant case. On the contrary, as noted above, a great deal of the defendants' testimony supported the findings of the District Court. Yet

what is most disturbing is that after making the accusation against the District Court, the Court of Appeals accepted every self-serving statement made by the defendants as gospel without consideration of the duty to evaluate the credibility of the defendants as well as the duty to evaluate all of the testimony, including that of the plaintiff prisoners.

According to the Federal Rules of Civil Procedure and good appellate practice credibility determinations and questions of fact are to be made by the trier of fact, the District Court.[6/] A panel of the Appellate

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6/This Court has recently indicated that it will, in the near future, address the extent to which an appellate court may properly review the district court's finding of fact. Anderson v. City of Bessmer, 717 F.2d 149 (4th Cir. 1984), cert. granted, 52 U.S.L.W. 3906 (June 18, 1984).

Court does not hear these matters de novo. Considered under the appropriate standards of appellate review, the decision of the District Court should have been affirmed.

III. The Supreme Court Should Determine Whether The Use of Mace And/Or Other Chemical Agents On Prison Inmates, When They Are Locked In Cells, Handcuffed Or Otherwise Restrained, And Do Not Pose An Immediate Threat Of Bodily Injury Or Death, Violates The Inmates' Rights Under The Eighth And/Or Fourteenth Amendments To The United States Constitution.

The use of mace and other chemical agents on prisoners who are confined to cells, handcuffed, or otherwise restrained, particularly when those inmates do not pose an immediate threat of bodily injury or death, presents significant constitutional issues that merit the attention of this Court.

Prisoners retain certain constitutional rights upon their incarceration including the right to be free from cruel and unusual punishment in violation of the Eighth Amendment. Estelle v. Gamble, 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976), reh. denied, 429 U.S. 1066, 97 S.Ct. 798, 50 L.Ed.2d 785, (1977) on remand, 554 F.2d 653 (5th Cir. 1977), reh. denied, 559 F.2d 1217 (5th Cir. 1977), cert. denied, 434 U.S. 974, 98 S.Ct. 530, 54 L.Ed.2d 465 (1977); Inmates of Attica Correctional Facility v. Rockefeller, 453 F.2d 12, 23 (2d Cir. 1971). As stated by the Ninth Circuit Court of Appeals in Spain v. Procunier, 600 F.2d 189, 193-194 (9th Cir. 1979):

> Whatever rights one may lose at the prison gates, . . . the full protections of the eighth amendment most certainly remain in

> force. The whole point of the amendment is to protect persons convicted of crimes. Eighth amendment protections are not forfeited by one's prior acts. Mechanical deference to the findings of state prison officials in the context of the eighth amendment would reduce that provision to a nullity in precisely the context where it is most necessary. The ultimate duty of the federal court to order that conditions of state confinement be altered where necessary to eliminate cruel and unusual punishments is well established. (Citations omitted).

In Estelle v. Gamble, supra, this Court evaluated the protections of the Eighth Amendment in the prison context as follows:

> The Amendment embodies "broad and idealistic concepts of dignity, civilized standards, humanity, and decency . . .," Jackson v. Bishop, 404 F.2d 571, 579 (C.A. 8 1968), against which we must

> evaluate penal measures. Thus, we have held repugnant to the Eighth Amendment punishments which are incompatible with "the evolving standards of decency that mark the progress of a maturing society." Trop v. Dulles, supra, at 101, 78 S.Ct. at 598; see also Gregg v. Georgia, supra, at 172-173, 96 S.Ct. at 2925 (joint opinion); Weems v. United States, supra, 217 U.S. at 378, 30 S.Ct. at 553, or which "involve the unnecessary and wanton infliction of pain," Gregg v. Georgia, supra, at 173, 96 S.Ct. at 2925 (joint opinion); see also Louisiana ex rel. Francis v. Resweber, 329 U.S. 459, 463, 67 S.Ct. 374, 376, 91 L.Ed. 422 (1947); Wilkerson v. Utah, supra, 99 U.S. at 136.

429 U.S. at 102-103, 97 S.Ct. at 290, 50 L.Ed.2d at 259.

In addition to constitutional rights under the Eighth Amendment, prisoners retain certain rights under the Fourteenth Amendment and "may not

be deprived of life, liberty or property without due process of law." Hewitt v. Helms, supra; 48 (3d Cir. 1983); Wolff v. McDonnell, supra. Furthermore, as noted above, a due process right in the prison context may arise from the Constitution or some entitlement of the state such as statute, custom, policies, practices, rules or regulations.[7/] Hewitt v. Helms, supra; Meachum v. Fano, supra.

In the instant case, the plaintiffs-petitioners maintain that their rights under the Eighth and Fourteenth Amendments have been violated through the indiscriminate use of mace and chemical agents by the defendants-respondents without just

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7/A brief discussion of the applicable regulations giving rise to the plaintiffs-petitioners' claims under the Fourteenth Amendment can be found supra at pp. 33-40.

cause or provocation. The use of mace is neither a new nor a rare event in prison systems, and several circuit courts have at least peripherally addressed the constitutional implications of such conduct. For example, it has been held that the use of mace and chemical agents on prisoners does not constitute cruel and unusual punishment when it is reasonably necessary to prevent riots or excape or to subdue recalcitrant prisoners. See e.g. Poindexter v. Woodson, 510 F.2d 464, 466 (10th Cir. 1975), cert. denied, 423 U.S. 846, 96 S.Ct. 85, 46 L.Ed.2d 68 (1975); Clemmons v. Greggs, 509 F.2d 1338, 1340 (5th Cir. 1975), cert. denied, 423 U.S. 946, 96 S.Ct. 360, 46 L.Ed.2d 280 (1975); Bailey v Turner, 736 F.2d 963 (4th Cir. 1984). Nonetheless, several courts have held that the use

of mace and chemical agents in quantities greater than necessary and for illegitimate purposes, such as the infliction of pain or punishment, is violative of the Eighth Amendment. Stringer v. Rowe, 616 F.2d 993, 999 (7th Cir. 1980); Spain v. Procunier supra; Greear v. Loving, 538 F.2d 578, 579-580 (4th Cir. 1976); Morris v. Travisono, 528 F.2d 856, 858-859 (1st Cir. 1976); Patterson v. MacDougall, 506 F.2d 1, 3-5 (5th Cir. 1975); McCargo v. Mister, 462 F.Supp. 813, 818-819 (D. Md. 1978); Battle v. Anderson, supra; Landman v. Royster, 333 F.Supp. 621 (E.D. Va. 1971).

The widespread nature of the litigation in this area, which is reflected in the cases cited above, is not surprising given the obvious importance which is attached to any alleged violation of an individual's

constitutional rights. However, the significance of the issues involved in this field of litigation can only be fully understood when one weighs the medical consequences of spraying a human being with mace or another chemical agent, against the fact that the victims of these sprayings had not created an immediate threat of bodily injury or death to another. The District Court found that the application and use of chemical agents might result in serious and permanent physical injury, especially to the eyes and skin, in the absence of immediate and competent medical attention. (Finding 18; 566 F.Supp. at 781; App. p. 94.) Although the Court of Appeals apparently preferred to deemphasize this aspect of the trial (744 F.2d at 1262, App. pp. 10-11), the serious medical

consequences of the use of mace and other chemical agents were established at trial by the defendants' own admissions and the expert testimony of Dr. Robert Hyndiuk. During his adverse examination, defendant Gerald Heeringa admitted that mace might cause serious injury and even death, that the effects of mace would be greater in an enclosed area such as a prison cell in the adjustment center and that he knew of those risks and dangers as a result of the manufacturer's warnings and instructions. Dr. Hyndiuk testified that permanent, irreversible eye damage due to corneal ulceration and corneal scarring would result from the improper or prolonged use of mace. Dr. Hyndiuk further testified that in order to avoid this permanent injury, the eyes of inmates who suffered the

effects of mace should be rinsed copiously with water or other proper solution. If the effects continued, the inmates should be given an ophthalmic examination with at least appropriate magnification instruments to determine if further medical attention is required to avoid permanent damage. The serious medical consequences of the use of mace and other chemical agents against prisoners also has been recognized by other courts. See, e.g., Spain v. Procunier, 600 F.2d at 194; Battle v. Anderson, 376 F.Supp. at 423. These consequences illustrate the need for strict compliance with all applicable regulations regarding the use of mace on inmates. Moreover, these consequences underscore the significance of the constitutional issues raised by the use of mace on inmates who are restrained and who

have not created an immediate threat of death or bodily injury to another.

Despite the obvious significance of the issues present in this area, and the widespread and somewhat conflicting decisions of the circuit courts that have addressed these issues, the plaintiffs-petitioners are unaware of any case in which this Court has addressed whether the use of chemical agents on prisoners who are locked in cells, handcuffed or otherwise restrained, and who have not threatened anyone with bodily injury or death, violates their rights under the Eighth and/or Fourteenth Amendments to the United States Constitution. The plaintiffs-petitioners respectfully submit that it is time for the Court to address these important issues.

CONCLUSION

WHEREFORE, petitioners respectfully pray that a Writ of Certiorari issue from this Honorable Court to review the judgment of the Seventh Circuit Court of Appeals in Soto v. Dickey.

Dated this 5th day of February, 1985.

Peter L. Gardon

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